IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-218

R. GEORGE SILVOLA,
Petitioner,

vs

PEOPLE OF THE STATE OF COLORADO
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF STATE OF COLORADO

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Petitioner by and through his attorneys, FRED W. VONDY, ANTHONY L. WORTH and CHARLES F. MURRAY, pray that a Writ of Certiorari issue to review the judgment heretofore entered against him by the Supreme Court of the State of Colorado.

CITATION TO OPINION BELOW

The opinion of the Colorado Supreme Court is not yet reported in the official Colorado reports, but is reported in the advance sheets, to wit: *People* v. *Silvola*, _____ C _____, 457 P.2d 1283 (1976). A copy of the published opinion is attached hereto in the Appendix as Exhibit "A".

JURISDICTION

The judgment of the Colorado Supreme Court was rendered on March 15, 1976, with the petition for rehearing denied on April 19, 1976. Jurisdiction of this Court is involved pursuant to 28 USC § 1257(3), petitioner having asserted below and asserting here deprivation of certain rights guaranteed by the Constitution of the United States.

QUESTIONS PRESENTED

I.

UNDER THE CURRENT POSTURE OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS, DID THE SUBMISSION TO THE TRIAL JURY OF FOUR COUNTS OF THEFT RECEIVING (NOS. 2 THROUGH 5) FOR WHICH THERE WAS A TOTAL LACK OF EVIDENCE AS A MATTER OF LAW, SO TAINT THE JURY'S DELIBERATIONS, AS TO DENY THE DEFENDANT DUE PROCESS OF LAW AS TO THE REMAINING CHARGES (NOS. 1, 6 AND 7), ESPECIALLY CONSIDERING THAT THE JURY ACTUALLY DELIBERATED LESS THAN THREE HOURS FOLLOWING A TWO WEEK TRIAL.

II.

UNDER THE CURRENT POSTURE OF THE FIFTH AND FOURTEENTH AMENDMENTS, DID THE TRIAL COURT'S FAILURE TO INSTRUCT ON THE DEFENDANT'S THEORY OF THE CASE DENY THE DEFENDANT DUE PROCESS OF LAW WHEN NO INSTRUCTION INCORPORATED DEFENDANT'S THEORY OF THE CASE, AND THE JURY WAS NEVER ADVISED THAT THE ACTS OF THE PETITIONER COULD BE CONSIDERED BY THEM AS INNOCENT ACTS.

III.

UNDER THE CURRENT POSTURE OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS, DID THE TRIAL COURT BY ITS REFUSAL TO EXCUSE JUROR BROWN FOR CAUSE, THEREBY FORCING THE DEFENDANT TO EXCUSE JUROR BROWN BY USING HIS LAST PEREMPTORY CHALLENGE, DENY DEFENDANT DUE PROCESS OF LAW, EQUAL PROTECTION OF THE LAW, AND THE OPPORTUNITY TO [illegible] A FAIR AND IMPARTIAL JURY TO DETERMINE THE CHARGES?

IV.

UNDER THE CURRENT POSTURE OF THE FIFTH AND FOURTEENTH AMENDMENTS, WAS THE DEFENDANT DEPRIVED OF DUE PROCESS OF LAW WHEN HIS LAW OFFICE EMPLOYEES WERE FORCED TO TESTIFY AGAINST HIM CONTRARY TO AND IN VIOLATION OF STATE STATUTE.

V.

UNDER THE CURRENT POSTURE OF THE FIFTH AND FOURTEENTH AMENDMENTS, MAY A CONVICTION BE PERMITTED TO STAND WHEN CERTAIN COUNTS OF THE INDICTMENT FAILED TO CONTAIN OR ALLEGE THE SPECIFIC INTENT SET FORTH IN THE STATE STATUTES AS AN ESSENTIAL ELEMENT OF THE CRIMES CHARGED, WHEN REQUIRED BY STATE STATUTE, THEREBY DEPRIVING THE DEFENDANT OF DUE PROCESS OF LAW.

CONSTITUTIONAL AND STATUTORY PROVISIONS

AMENDMENT V — CAPTITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI — JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the

State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witness in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV — CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunitites of any citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

40-1-12. Accessories—standing by—not present—during the fact.—

An accessory is he who stands by and aids, abets or assists, or who, not being present, aiding, abetting or assisting, has advised and encouraged the perpetration of the crime. He who thus aids, abets or assists, advises or encourages, shall be deemed and considered as principal and punished accordingly. An accessory during the fact is a person who stands by, without interfering or giving such help as he may in his power to prevent a criminal offense from being committed. An accessory during the fact shall be a competent witness unless disqualified from other causes.

40-1-13. Accessory after the fact—penalty.—

An accessory after the act is a person who, after a full knowledge that a crime has been committed, conceals it from the magistrate, or harbors and protects the person charged with or found guilty of the crime. Any person found guilty of being an accessory during or after the fact, shall be imprisoned for any term not exceeding two years and fined in a sum not exceeding five hundred dollars, in the discretion of the court, to be regulated by the circumstances of the case and the enormity of the crime. If the crime has been committed against the person of magistrate, of a police or other public officer in the discharge of his duties, it shall be an aggravating circumstance, and the penalty shall be regulated accordingly.

40-5-2. Theft.—

(1) (a) Any person commits theft when he knowingly:

(b) (i) Obtains or exerts unauthorized control over anything of value of another; or

(ii) Obtains by deception control over anything of value of another; or

(iii) Obtains by threat control over anything of value of another; or

(iv) Obtains control over any stolen thing of value knowing the thing of value to have been stolen by another; and

(c) (i) Intends to deprive another permanently of the use or benefit of the thing of value; or

(ii) Knowingly uses, conceals, or abandons the thing of value in such manner as to deprive another permanently of such use or benefit; or

(iii) Uses, conceals, or abandons the thing of value in such manner as to deprive another permanently of such use or benefit.

(2) (a) Any person who commits theft where the value of the thing involved does not exceed one hundred dollars, and any person who commits theft twice or more within a period of six months and from the same person where the aggregate value of the things involved does not exceed one hundred dollars, is guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than three hundred dollars, or by imprisonment in the county jail not to exceed six months, or by both such fine and imprisonment

(b) Any person who commits theft where the value of the thing involved exceeds one hundred dollars, and any person who commits theft twice or more within a period of six months from the same prson and has not been placed in jeopardy for the prior offense, where the aggregate value of the things involved exceeds one hundred dollars, is guilty of a felony and, upon conviction, shall be punished by imprisonment in the state penitentiary for not less that one year nor more than 10 years.

(3) In every indictment or information charging a violation of this section, it shall be sufficient to allege that, on or about a day certain, the defendant committed the crime of theft by unlawfully taking a thing or things of value of a person or persons named in the indictment or information.

(4) Wherever any law of this state refers to or mentions larceny, stealing, embezzlement (except embezzlement of public moneys), false pretenses, confidence game, or shoplifting, said law shall be interpreted as if the word "theft" were substituted therefor; and in the enactment of this section, it is the intent of the general assembly to define one crime of theft and to incorporate therein such crimes, thereby removing distinctions and technicalities which previously existed in the pleadings and proof of such crimes.

40-7-35. Conspiracy in general—penalty.—

If any two or more persons shall conspire or agree, falsely and maliciously, to charge or indict, or be informed against, or cause to procure to be charged or indicted or informed against any person for any criminal offense, or shall agree, conspire or cooperate to, or to aid in doing any other unlawful act, each of the persons so offending shall on conviction, in case of a conspiracy to commit a felony, be confined in the penitentiary for a period of not less than one year, nor more than ten years, and incase of a conspiracy to commit a misdemeanor, be fined in any sum not exceeding one thousand dollars, or imprisoned in the county jail not exceeding one year, or both such fine and imprisonment.

AN ACT

TO AMEND SECTION 7274 OF THE GENERAL STATUTES OF COLORADO OF 1908 AND REPEALING SAID ORIGINAL SECTION NO. 7274.

Be it Enacted by the General Assembly of the State of Colorado:

Section 1. That Section 7274 of the General Statutes of the State of Colorado of 1908, be amended so as to read as follows:

7274. WHO MAY NOT TESTIFY WITHOUT CONSENT.—Section 9. There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore a person shall not be examined as a witness in the following cases:

Second—An attorney shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment: nor shall an attorney's secretary, stenographer or clerk be examined without the consent of his employer concerning any fact, the knowledge of which he has acquired in such capacity.

154-1-7. Who may not testify without consent.—

(1) There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person shall not be examined as a witness in the following cases:

(3) An attorney shall not be examined without the consent of his client, as to any communication made by the client to him, or his advice given thereon in the course of professional employment; nor shall an attorney's secretary, stenographer or clerk be examined without the consent of his employer concerning any fact, the knowledge of which he has acquired in such capacity.

(7) A certified public accountant shall not be examined without the consent of his client as to any communication made by the client, to him in person or through the media of books of account and financial records, or his advice, reports or working papers given or made thereon in the course of professional employment, nor shall a secretary, stenographer, clerk or assistant of a certified public accountant be examined without the consent of the client concerned concerning any fact, the knowledge of which he has acquired in such capacity.

(8) A certified psychologist shall not be examined without the consent of his client, as to any communication made by the client to him, or his advice given thereon in the course of professional employment; nor shall a certified psychologist's secretary, stenographer or clerk be examined without the consent of his employer concerning any fact, the knowledge of which he has acquired in such capacity.

155-3-401. Signature.—

(1) No person is liable on an instrument unless his signature appears thereon.

(2) A signature is made by use of any name, including any trade or assumed name, upon an instrument, or by any word or mark used in lieu of a written signature.

155-3-405. Imposters—signature in name of payee.—

(1) An indorsement by any person in the name of a named payee is effective if:

(a) An imposter by use of the mails or otherwise has induced the maker or drawer to issue the instrument to him or his confederate in the name of the payee; or

(b) A person signing as or on behalf of a maker or drawer intends the payee to have no interest in the instrument; or

(c) An agent or employee of the maker or drawer has supplied him with the name of the payee intending the latter to have no such interest.

(2) Nothing in this section shall affect the criminal or civil liability of the person so indorsing.

III. INDICTMENT AND INFORMATION

Rule 7. The Indictment and the Information

(a) Indictment. Any offense against the People of the State of Colorado may be prosecuted by the indictment returned according to law. The indictment shall be returned in open court and shall have indorsed thereon the names of the witnesses in the same manner and with the same effect as in the case of the indorsement of witnesses upon an information. The indictment shall also be signed by the foreman of the grand jury.

(f) Bill of Particulars. The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be be made only within ten days after arraignment or at such other time before or after arraignment as may be prescribed by rule or order. A bill of particulars may be amended at any time subject to such conditions as justice requires.

Rule 12. Pleadings, Motions before Trial, Defenses and Objections

(b) The Motion Raising Defenses and Objections

(1) **Defenses and objections which may be raised.** Any defense or objection which is capable of determination without the trial of the general issue may be raised by motion.

(2) **Defenses and objections which must be raised.** Defenses and objections based on defects in the institution of the prosecution or in the indictment or information or complaint, or summons and complaint, other than that it fails to show jurisdiction in the court or to charge an offense, may be raised only by motion. The motion shall include all such defenses and objections then available to the defendent. Failure thus to present any such defense or objection constitutes a waiver of it, but the court for the

cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the proceeding.

Rule 29. Motion for Acquittal

(a) Motion for Judgment of Acquittal. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court onmotion of a defendant or of its own motion shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment or information, or complaint, or summons and complaint after the evidence on either side is closed, if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the prosecution is not granted, the defendant may offer evidence without having reserved the right. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the People's case.

(b) Reservation of Decision on Motion. If a motion for a judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before thejury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.

(c) Motion after Verdict or Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within ten days after the jury is discharged or within such further time as the court may fix during the ten day period. If a verdict of guilty is returned, the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned, the court may enter judgment of acquittal. It shall

be necessary to the making of such a motion that such a similar motion has been made prior to the submission of the case to the jury.

DR 9-102 Preserving Identity of Funds and Property of a Client

(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay bank charges may be deposited therein.

(2) Funds belonging in part ot a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A lawyer shall:

(1) Promptly notify a client of the receipt of his funds, securities, or other properties.

(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.

(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

Constitution of Colorado

Article II Section 25, Due Process of Law — No person shall be deprived of life, liberty or property, without due process of law.

40-4-401. Theft. (1) A person commits theft when he knowingly obtains or exercises control over any thing of value of another without authorization, or by threat or deception, or knowing said thing of value to have been stolen; and:

(a) Intends to deprive such other person permanently of the use of benefit of the thing of value; or

(b) Knowingly uses, conceals, or abandons the thing of value in such manner as to deprive such other person permanently of its use or benefit; or

(c) Uses, conceals, or abandons the thing of value intending that such use, concealment, or abandonment will deprive such other person permanently of its use and benefit; or

(d) Demands any consideration to which he is not legally entitled as a condition of restoring the thing of value to such other person.

STATEMENT OF THE CASE

This is a Petition for a Writ of Certiorari to review the judgment of the Colorado Supreme Court which affirmed the conviction of the petitioner upon three counts while reversing the conviction of the petitioner upon four other counts of a seven count Grand Jury Indictment. The petitioner is an attorney who was convicted of all seven counts of a Grand Jury Indictment returned by the El Paso County Colorado Grand Jury on May 25, 1972. The key witnesses against the peitioner were one Richard Davis also known as Richard Jarvis, a former client of petitioner, and two of Davis' employees, all being multi-convicted felons with long criminal records. Davis who was granted immunity by the prosecution in the case at bar as well as in other cases in return for his testimony against petitioner, is currently a fugitive from justice on many pending felony charges in several jurisdictions. His two employees, Shephard and Jackson, were also granted substantial concessions in return for their testimony against the petitioner.

The State's case against the petitioner upon the first six counts of the indictment was based upon the fact that certain checks given to the petitioner by Davis were deposited into petitioner's Attorney's Trust Account with the proceeds thereof being used to pay bills of Davis including attorney's fees and the remainder being given to the client Davis. All of the money in the trust account was paid out pursuant to the direction of the client Davis.

During the course of the trial, the client Davis testified that some of the checks deposited into the petitioner's trust account were from the sale of aircraft radio acquired legitimately while other checks deposited into the account were from the sale of aircraft radios stolen by members of Davis' gang of thieves. In addition, Davis also turned over to

petitioner some checks for collection which were deposited into the petitioner's trust account, while other checks were given to petitioner by Davis from miscellaneous sources which were in no way connected to the sale of aircraft radios.

This case was commenced by the handling down of the Amended Indictment alleging one count of Conspiracy, five counts of Theft Receiving and one count of Theft.

Count I alleged a Conspiracy to commit Theft of aircraft, aircraft radios and aircraft parts between September 1, 1968 to February 5, 1970 (TR 3).

Counts II through V alleged Theft by Receiving of aircraft radios (TR 3 and 4)). The conviction of the petitioner on these counts of the amended indictment were reversed by Colorado Supreme Court for lack of evidence.

Count VI likewise alleged theft by receiving on a date certain of an aircraft radio (TR 4 and 5).

The State in outlining their theory of the case admitted that petitioner never had possession of any airplane radios as alleged in Counts II through VI.

Count VII alleged the theft of an airplane from one William Cunningham and the Kern County Airport, California, said theft occurring between September 1, 1969 and November 1, 1969 in El Paso County, Colorado. (TR 5)

To this the petitioner pleaded not guilty as to all counts. The petitioner filed a motion for a Bill of Particulars, TR 100, which was granted. The State filed an Answer, TR 154, and an Amended Answer, TR 164.

The petitioner moved to dismiss (f 4310) and the State outlined their theory of the case (f.3924) and the motion was denied (f. 3932). Proper motions for discovery (TR 48 and 102) were made and ordered by Trial Court including a

continuing order to the State to furnish all relevant future information. A motion to suppress evidence was made and denied at the pre-trial conference (TR 172 and 174).

Petitioner filed a motion to quash the jury panel (TR 179) and following a hearing, this was denied (TR 2-24), and Open Venire had to be restored to (TR 177 and 183) after the State had furnished the original jury list to the petitioner pursuant to Colorado Law (TR 159 and 160) (TR 186 through 190).

A special venire was required because venue was changed from the metropolitan area of Colorado Springs to a small farming community and the Trial Court determined that those persons on the jury panel engaged in agricultural pursuits should be dismissed because of the season. Juror Brown, the subject of this section of the petition, was the custodian of the small town courthouse where trial was held and in which the petitioner had appeared several times before and was familiar with details of the case (TR 37, 42, 43).

Jury selection commenced and thereafter Juror James Lyle Brown was challenged *THREE TIMES* for cause following statements since that he had formed an opinion he would require Petitioner to prove his innocence, and petitioner would have to take the stand to prove his innocence. The Court tried to rehabilitate the Juror and denied each challange for cause (TR 38 to 47) thereby requiring the petitioner to use his last peremptory challenge to dismiss him (TR 185).

During the Trial (which lasted ten (10) days and included two hundred fourteen (214) exhibits on the part of the People), a Motion for directed verdict was made at the completion of the States' case, (TR 866), and renewed at the close of the petitioner's case. (TR 1019), both of which were denied. The jury returned verdicts of guilty to all counts after deliberating *less than three hours* (TR 255-231). The

petitioner filed motions for new trial and in arrest of judgment (TR 233 to 262).

From the conviction, judgment and sentence, the petitioner prosecuted an Appeal to the Colorado Supreme Court, which reversed, remanded and directed the dismissal of Counts II through V and affirmed Counts I, VI and VII of the amended indictment (TR 3-5).

The People proved Richard Davis to be the master-mind of the airplane theft operation and as such the principal thief. Petitioner-attorney Silvola had been retained to represent Davis on a single Governor's Warrent issued at the request of the State of Kansas wherein Kansas wanted Davis to serve his sentence for second-degree forgery and counterfeit car title conviction.

The State of Washington had Davis held upon a fifteen year sentence and escape therefrom. This case was dismissed for lack of a Governor's Warrent at year end 1968. As Davis was about to make bond on March 19, 1969, a request on Order and Warrant issued out of Arapahoe County District Court where Davis was confined. "People's Exhibit 'b' " was part of that warrant. Petitioner-attorney was*Court Appointed Counsel* in said case and case was dismissed when no Colorado Governor's Warrant would issue because the Colorado Governor had an outstanding warrant based upon the Governor of Kansas' request. This case was appealed to the Colorado Supreme Court and is reported as *Davis* v *People*, 172 Colo. 486, 474 P.2d 206.

Davis later was the State's star witness against the petitioner, for which he received in the way of consideration including but not limited to the following:

1. Parole from the Kansas State Penitentiary and transfer to the State of Colorado pursuant to the Interstate Compact. (TR 794)

2. Having a Detainer dismissed by the State of Washington, which Detainer would hve forced Davis to return to that state to commence serving a fifteen year sentence for Grand Theft (TR 812).

3. Having another Detainer for Felony Escape arising from the fifteen year sentence imposed by the State of Washington above disposed of by a Guilty Plea and receiving seven years probation therefor. (TR 794)

4. Numerous other considerations which were not disclosed to petitioner.

After the jury verdict, the petitioner filed motions in Arrest of Judgment and for a New Trial (TR 233 through 262) which were denied (TR 263 and 264). In the respective motions, petitioner raised the following issues:

1. The Trial Court failed to grant a challenge for cause against Juror Brown who stated he had formed an opinion as to guilt or innocence of petitioner and that he would require evidence from the petitioner himself to remove the opinion as well as require him to take the stand, and therefore the petitioner had to use his last peremptory challenge to remove the prospective juror. (TR 234 (2))

2. That the Trial Court failed to recognize the attorney-client privilege provisions of 1963 C.R.S. 154-1-7(3) when petitioner employees were permitted to testify over his objections. (TR 283(22) (23) (24)).

3. That the Trial Court failed to instruct on the defendant's theory of the case by refusing to give certain tendered instructions (TR 240 and 241(29) (30) (31) (32)).

4. That petitioner was deprived of due process of law under Section 25, Article II, Colorado Constitution

and the Fourteenth Amendment of the United States Constitution when Trial Court failed to grant the petitioner's motion for judgment of acquittal at close of People's and defendant's case (TR 255).

5. That the Trial Court lacked jurisdiction of the subject matter of Count I in that it failed to allege an offense under Colorado Law (TR 254).

6. That the petitioner was charged with theft receiving in Count VI. That by judicial admission the defendant never had physical possession of the goods (folio 3298 on Page 2, Reporter's Transcript on *People's Motion to Take Deposition and Defendant's Oral Motion to Dismiss Counts II to VI, inclusive)*, Motion for New Trial (TR 247 (53)). Motion in Arrest of Judgment (TR 257).

7. That petitioner was charged with theft of an airplane known as N 2517 G in Count VII and the Court failed to dismiss said Count when testimony disclosed the asportation on February 1968, or 9½ months prior to the petitioner being hired to represent Richard Davis or fourteen months before the dates alleged in the indictment. Proof of time and venue failed (TR 247 (52)) (TR 5).

Petitioner raised the issues again in his opening brief to the Colorado Supreme Court, with specific reference to the Motion for New Trial and Arrest of Judgment at Page 27 of the petitioner's Opening Brief, and further pursued them in his motion for rehearing after the Colorado Supreme Court announced its decision.

Following the announcement of the decision, petitioner filed a Motion for Supplemental Appeal (later incorporated in the Petition for Rehearing), raising the issue whether in this case it was a denial of Due Process to allow the jury to

consider the four counts reversed by the Colorado Supreme Court together with the three counts affirmed. That motion as well as the subsequent motion for rehearing was denied by the Colorado Supreme Court.

Other facts relevant to particular issues will be referred to in the argument as appropriate.

REASONS FOR GRANTING THE WRIT

Petitioner contends that his conviction under the State Statutes set forth violates the Due Process clause of the Fifth and Fourteen Amendments oand the Equal Protection clause of the Fourteenth Amendment on the basis that the erroneous submission of four counts of a seven count indictment (which four counts were reversed for lack of evidence) tainted the jury's deliberations. Petitioner further contends that he was also denied Due Process by a failure to instruct on his theory of the case, by requiring his employees to testify against him in violation of a State Statute on privilege and by failure to include an allegation of specific intent in the indictment when specific intent is an element of the crime by statute and case law.

Petitioner further contends that requiring him to use his last peremptory challenge against one of the prospective jurors not only denied him due process and equal protection (as cited above) but also denied him a Fair and Impartial Jury under the Sixth Amendment.

Notwithstanding these allegations, Petitioner's convictions of three of the seven counts for which he was tried were affirmed by the Colorado Supreme Court.

ARGUMENTS

I

UNDER THE CURRENT POSTURE OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS, DID THE SUBMISSION TO THE TRIAL JURY OF FOUR COUNTS OF THEFT RECEIVING (COUNTS NUMBERED II THROUGH V) FOR WHICH THERE WAS A TOTAL LACK OF EVIDENCE AS A MATTER OF LAW, SO TAINT THE JURY'S DELIBERATIONS, AS TO DENY THE DEFENDANT DUE PROCESS OF LAW AS TO THE REMAINING THREE CHARGES, COUNTS NUMBERED I, VI AND VII, ESPECIALLY CONSIDERING THAT THE JURY ACTUALLY DELIBERATED LESS THAN *THREE HOURS* FOLLOWING A TWO WEEK TRIAL?

The facts of the case to resolve question number one are in retrospect quite simple. The gist of the People's case against the petitioner consisted mainly of the testimony of Richard Davis, a multi-convicted felon who is presently a fugitive from justice and some 214 exhibits admitted into evidence with approximately 190 given to the jury to examine during its deliberation. The 214 exhibits were duplicitous in that they consisted mainly of original bank deposit slips, checks deposited into petitioner's trust account, bank photocopies of these same checks, checks drawn by the petitioner on his trust account at client's direction, bank photocopies of the checks drawn by petitioner and some checks turned over by the client to the petitioner for collection. These exhibits were maintained in the presence of the jury throughout the course of the trial by being attached to two 4' x 4' blackboards, in the Courtroom. Attached herein are photographs of the blackboards which photographs later became part of the petitioner's case. (See Appendix B)

The trial herein comprised of some nine and one-half days of trial with the jury retiring for its deliberationa little before noon qn the tenth day. After returning from its lunch break and resuming deliberation the jury reached a verdict

on all counts of the indictment. The personnel involved were notified that the jury had reached a verdict, the participants involved were reassembled in the courtroom, the Court reconvened the trial and the formal verdict was read and received into the record at 3:27 P.M. that same day.

Thereafter four counts of the seven count indictment (57.14%) were reversed by the Colorado Supreme Court due to insufficient evidence as a matter of law.

Colorado belongs to that block of states that requires the trial Court to pass as a matter of law on the question of the sufficiency or insufficiency of the evidence to determine which, if any, counts of an indictment or information shall be given to the jury for determination. This is brought into play by motion for judgment of acquittal under Rule 29 of the Colorado Rules of Criminal Procedure, see C.R.S. 73, Volume 7, Page 65 thereof. Such a motion was made in this case.

THE COLORADO RULES OF CRIMINAL PROCEDURE

Rule 29 provides inter alia:

"The Court on motion of a defendant or of its own motion shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment . . . " after the evidence on either side is closed, if the evidence is insufficient to sustain a conviction of such offense or offenses.

A recent pronouncement on this subject by the Colorado Supreme Court occurs in the case of *People* v *Bennet*, 183 Colo. 123, 515 P.2d 466. In that case the Colorado Supreme Court has reconfirmed the previously announced principles regarding the function of the trial court in ruling on a judgment of acquittal and cites several Federal cases confirming the Colorado rule.

The Colorado Supreme Court stated at 125 Colo. page 129:

> "When a trial judge is confronted with a motion for judgment of acquittal at either the close of the prosecutor's case or the close of all of the evidence, he *must* determine whether the evidence before the jury is sufficient in both quantity and quality to submit the issue of the defendant's guilt or innocence to the jury . . . . To withstand a motion for a judgment of acquittal the prosecution has the burden of establishing a prima facie case of guilt and must introduce sufficient evidence to establish guilt beyond a reasonable doubt, no more, no less . . . . but (the court) should prevent a case from being submitted to the jury when the prosecution has failed to meet its burden . . . . If the evidence is such that reasonable jurors must necessarily have a reasonable doubt, *the judge must direct an acquittal*, because no other result is permissible."

In *Hemphill* v *U.S.* 312 U.S. 657, 6 S. Ct. 729, 85 L.Ed 1106, this Court held that it was mandatory on the trial judge to dismiss and not a matter of discretion, and if the denial of the motion was erroneous when made, it should be corrected on appeal. Few errors of law are as prejudical to the defendant.

In the *American Tobacco Co.* v *U.S.* 328 U.S. 781 (787n) 66 S. Ct. 1125, 90 L.Ed 1575, this Court declared, "the verdict in a criminal case is sustained only when there is relevant evidence from which the jury could properly find an infer, beyond a reasonable doubt, that the accused is guilty".

In *Curley* v *U.S.*, 160 F.2d 229 (232) cert. den., the Court held "it is the function of the judge to deny the jury any opportunity to operate beyond its province — If the evidence is such that reasonable jurymen must necessarily have such a doubt, the judge must require acquittal because no other result is permissible within the fixed bounds of jury consideration". See also *U.S.* v *Melillo*, 275 F.Sup. 314 at Page 319.

In *Cooper* v *U.S.*, 218 F.2d at Page 42, the Court held "Guilt, according to a basic principle in our jurisprudence, must be established beyond a reasonable doubt. And, unless that result is possible on the evidence, the judge must not let the jury act; he must not let it act on what would necessarily be only *surmise and conjecture without evidence*". This was further affirmed in *Bailey* v *U.S.*, 416 F.2d 1110 at Page 1113.

The Trial Court violated the petitioner's Fifth, Sixth and Fourteenth Amendments rights when it allowed Counts II, III, IV and V to be submitted to the jury knowing there was insufficient evidence to support a prima facie case as required by law. This action tainted the jury's actions and deliberations by permitting them to surmise, speculate and conjecture as to petitioner's guilt thereon and poisoned the jury's deliberations as to all the other counts given to them by the Trial Court.

The Colorado Supreme Court compounded the error when it refused to grant the petitioner a new trial on Counts I, VI and VII, even though the Court found insufficient evidence as a matter of law as to Counts II, III, IV and V, and reversed the conviction and ordered dismissal as to these counts.

The deliberations of the jury were hopelessly tainted in allowing Counts II, III, IV and V to be considered by the jury and no amount of legal sophistry will cure the fact that the

defendant was denied a fair trial by the action of the Trial Court in submitting all counts to the jury. More than one half of the counts were reversed upon appeal for lack of evidence and yet the Colorado Supreme Court refused to order a new trial on the remaining counts thus depriving the petitioner of due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

As far as petitioner is able to determine, this is a matter of first impression in the United States Supreme Court. The petitioner feels that this Court should grant his Petition for Certiorari in order to allow this vital issue to be fully briefed, argued and requests this Court to set down guide lines and prece dents to be followed by Trial Courts throughout the land on this issue.

II

UNDER THE CURRENT POSTURE OF THE FIFTH AND FOURTEENTH AMENDMENTS, DID THE TRIAL COURT'S FAILURE TO INSTRUCT ON THE DEFENDANT'S THEORY OF THE CASE DENY THE DEFENDANT DUE PROCESS OF LAW WHEN NO INSTRUCTION INCORPORATED DEFENDANT'S THEORY OF THE CASE, AND THE JURY WAS NEVER ADVISED THAT THE ACTS OF THE PETITIONER COULD BE CONSIDERED BY THEM AS INNOCENT ACTS.

A. FAILURE TO INSTRUCT ON DEFENDANT'S THEORY OF THE CASE

It is hornbook law that a petitioner is entitled to an instruction of his theory of the case. *Johnson* v *People*, 145 Colo. 315, 358 P.2d 873 and cases cited there, and no matter how unlikely the defense may be, the petitioner is entitled to have his instructions - *Payne* v *People*, 110 Colo. 126, 132 P.2d 441. In the instant case, petitioner tendered instruction number 2 was (TR 565 and f3810 and 3811):

"You are instructed that a check or money order made payable to a perosn with an assumed name or alias is a valid instrument and subject to transfer."

The Uniform Commercial Code, which is cited in Volume 7A of 1963 Revised Statutes of Colorado sets forth in § 3 the various rules on the use and transfer of commercial paper. The Court's attention is specifically called to the provisions of 1963 C.R.S. 155-3-401(2) which specifically allows the use of a trade or assumed name and 1963 C.R.S. 155-03-405(1)(a) which says:

"An indorsement by a person in a name of a named payee is effective if:

(a) An impostor by use of the mail or otherwise has induced the maker or the drawer to issue the instrument to him or his confederate in the name of the payee; . . ."

Thus it is clear that the mere acceptance of commercial paper by a third person from an indorsing party is not criminal even if the indorsement made by the payee is an assumed, fictious or false name. In this case, the People may argue that the course of conduct may be evidence of criminal activity only upon the presentation of sufficient other evidence. Since this activity, (that is the accepting of checks drawn on a false or fictious name, or alias is not a criminal act in itself) the petitioner is entitled to have the jury instructed as to this aspect of the law.

Since the people relied upon this course of conduct of the petitioner in attempting to prove Counts I and VI of the indictment, the refusal of the Court to tender a proper instruction reciting the petitioner's theory of the case requires this Court to reverse this petitioner's conviction as to Counts I and VI.

The Colorado Supreme Court totally failed to rule upon the issue raised other than the summary statement found at Page 12 of its decision "the defendant's other contentions are wholly without merit and require no further discussion."

In *McCune* v *People*, 179 Colo. 262, 499 P.2d 1184, the Colorado Supreme Court has held that the defendant's theory of the case be accurately embodied in the instructions by the Trial Court, citing from *Clews* v *People* 151 Colo. 219, 377 P.2d 125 (1962).

A search of the instruction numbered 1 through 22 reveals there is no instruction or part thereof that covers the petitioner's theory of the case and the Trial Courts action affirmed by the Colorado Supreme Court's inaction runs against the proscription of the Fifth and Fourteenth Amendments of the U.S. Constitution. Also presented to the Court was tendered instruction number 4 that was refused which is located at TR 566 at folio 3813.

Trial Court refused tendered instructions nos. 5 and 6 found at TR 568 and TR 569 at folios 3815 and 3816.

Likewise the Trial Court refused tendered instruction number 8 found at TR 570 despite the prosecution's judicial admission thereto found at Folio 3924. Refusal is found at folio 3834-36.

B. IT WAS PLAIN ERROR FOR THE COURT NOT TO INSTRUCT SUA SPONTE THAT A LAWYER IS REQUIRED TO DEPOSIT FUNDS BELONGING TO HIS CLIENT IN A SPECIFICALLY DESIGNATED AND SEGREGATED ACCOUNT AND THAT THE LAWYER MAY NOT MAKE WITHDRAWALS OF THE CLIENT'S MONEY ON DEPOSIT WITHOUT THE PERMISSION OF THE CLIENT.

Even though the petitioner does not tender the appropriate instruction, in a proper situation the Court has

the duty to instruct concerning all material defenses. In this case, the tendered exhibits (that is the endorsements on the checks and deposit slips) clearly indicate that the checks and money orders received by the petitioner in this case were received by him in trust and in the course of his professional representation of the witness Davis. The commercial paper deposited bears the endorsement,

> 'Pay to the order the American Heritage Bank and Trust Co., R. George Silvola, Trust Account

and the deposit slips also contain the phrase,

> "R. George Silvola, Trust Account"

Canon 9, subsection DR9-102 of the Canons of Professional Responsibility (Appendix C to the Colorado Rules of Civil Procedure) requires an attorney to maintain a separate account in which to deposit funds belonging to the client to prevent commingling client's funds with the funds available to the lawyer for his personal use. That Canon further requires that any funds to be used by the attorney for his personal use should first be withdrawn from that account before application to the attorney's personal affairs.

Because the gist of this case as set forth in the voir dire, opening and closing arguments of the People, and the testimony from the witnesses themselves concerned the activities of the petitioner in the representation of the witness Davis and other alleged co-conspirators in his professional capacity, it is clearly indicated that the petitioner was entitled to and should have received from the Court and instruction to the jury that an attorney may accept funds for deposit from his client and that same must be segregated in special accounts. This is particularly true in this case where at TR f. 2636 the witness Davis specifically testified that checks were to be given to the petitioner for the purpose of deposit in his client's account

because of the relationship which the petitioner had with his bank and the volume of transactions through his client's account was such as to encourage the petitioner's bank to give petitioner "instant credit" on deposit items rather than withholding credit for deposit items pending collection of funds. This again is an activity which, upon its face, is an innocent act and the Court should have so instructed the jury.

The significance of the Trust Account deposits is revealed by Richard Davis' testimony concerning People's Exhibit "LL-1" which is a check for $350.00 dated June 3, 1969, payable to Davis. Davis testified that this is money that his wife had placed in petitioner's Trust Account several months earlier (TR 692 Folio 2801).

Richard Davis knew that he had caused to be deposited through his wife Madonna Davis $5,000 cash in petitioner's Trust Account on February 17, 1969. Prosecution's perjurious witness, Davis, knew these facts and the prosecutors knew in their investigation these exculpatory facts yet they deliberately covered up these facts and deliberately misled the Trial Court and Jury about the establishment of the Richard Davis Trust Account on the defendant's books.

Nowhere in this trial record is there further word about the opening of the Trust Account and the paying out of $5,000.00 in numerous trust account checks at the client's direction.

It is of the utmost significance that the next deposit to the Trust Account is revealed by People's Exhibits "L-1" and "L-2", the original and duplicate deposit slips dated July 8,

1969 for $770.00. Exhibits "M-1" and "M-2" dated July 22, 1969 show a deposit consisting of a $590 check and $300 cash for a total of $890.00. Davis turned over to the defendant the items involved in the deposits referenced above to cover People's Exhibit "LL-23" a check to Pierce and Jones for $1,650.00, check number 2981, that petitioner issued on Davis' behalf when Davis settled up with Sentinel Bonding Company for the balance still due on his appearance bond premium.

Thereafter, Davis with the prosecution's approval continued to offer his perjured testimony regarding funds he turned over to the defendant to be placed in the trust account. The prosecutors knew through their investigations of Richard Davis his proclivity to be a "pathological liar", and by offering him as their star witness they affirmed his perjured testimony and at no time did they offer to correct the perjury.

The Supreme Court of Colorado failed to meet this issue and deprived the defendant further of his Fifth and Fourteenth Amendment rights to due process of law by stating in its decision at Page 1 "the defendant's other contentions are wholly without merit and require no discussion".

The Trial Court and Colorado Supreme Court have acted contrary to the proscriptions of due process of law provided in the Fifth and Fourteenth Amendments by refusal to grant a new trial by the Trial Court's failure to instruct on defendant's theory of the case.

III

UNDER THE CURRENT POSTURE OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS, DID THE TRIAL COURT BY ITS REFUSAL TO EXCUSE JUROR BROWN FOR CAUSE, THEREBY FORCING THE DEFENDANT TO EXCUSE JUROR BROWN BY USING HIS LAST PEREMPTORY CHALLENGE, DENY DEFENDANT DUE PROCESS OF LAW, EQUAL PROTECTION OF TE LAW, AND THE OPPORTUNITY TO HAVE A FAIR AND IMPARTIAL JURY TO DETERMINE THE CHARGES?

Juror James Lyle Brown was number 15 on the certified list of jurors summoned to the District Court (TR 161) to hear this cause scheduled to commence January 8, 1973.

James Lyle Brown was an employee of Prowers County, Colorado, who worked as a custodian at the Courthouse. Exhibit 1A (TR 24). During the voir dire, prospective juror Brown was asked the following questions and gave the following answers.

> "QUESTION: Now, since you formed this opinion, would it at this time require evidence to remove that opinion?"
>
> "ANSWER: I would think so." at f. 847 (TR 41)
>
> "QUESTION: In this case, if you were selected as a juror to try this case, would you require evidence, as you say, on behalf of the defendant to remove that opinion?"
>
> "ANSWER: Yes, I would." at f. 849 and f. 850 (TR 41)

and again,

> "QUESTION: . . . Now, in this particular situation, with your opinion as you formed it, and *the defendant fails to take the stand and offer one word of evidence in his behalf*, would that fact, under your present state of

mind, have any tendency or influence in your verdict in this case?"

"ANSWER: I think it would." at f. 855 (emph. sup.) (TR 43)

At that time, of course, the Trial Court conducted a rather extensive voir dire of its own from TR 43 through TR 45 and persuaded the prospective juror to say the right things in response to later questioning by petitioner's counsel so that the rest of the questions and answers would appear not :o support a challenge for cause (TR 46). Juror Brown was challenged for cause on three occasions, TR 42, TR 43 and TR 46, and when the challenges were denied, the petitioner exercised his last peremptory challenge in removing the prospective juror (TR 47).

The law is clear that a prospective juror who has formed an opinion may be unqualified to sit as a juror and this is particularly true when the juror expresses the opinion from the jury box that he would require the petitioner to take the stand and/or present evidence in his behalf. See 1963 C.R.S. 78-5-3.

In order to demonstrate prejudicial error, petitioner must show that all of the peremptory challenges were exercised, as was done in this case, *Skeels* v *People*, 145 Colo. 281, 358 P.2d 605. It is abundantly clear that where a prospective juror indicates not once, but several times, that he has formed an opinion and it is likewise clear (as from this record) that his opinion is inimical to the petitioner, we submit that all of the fine questioning by the Court cannot remove that opinion from the mind of the prospective juror but only send it underground and reduce the juror to being a parrot when responding to further voir dire questions after the questioning by the Trial Court. It is clear that the better practice in such a situation would be for the Trial

Court to allow the challenge for cause, particularly so in view of the fact that the prospective juror was an employee at the Courthouse and not to require the accused to expend a valuable peremptory challenge in removing the juror from the panel.

The Colorado Supreme Court in its opinion stated that the petitioner failed to satisfy the second prong of the two fold test as set out in the Skeels case, *supra*, in that the petitioner failed to allege or show that he was "deprived of right to challenge other prospective jurors because he was forced to exhaust his peremptory challenges to excuse the earlier suspected juror". When the petitioner used his *last* peremptory challenge on juror Brown, it is elementary to everyone but the Colorado Supreme Court that he is deprived of his rights to challenge other potential jurors. By what type of legal gymnastics the Colorado Supreme Court reached its conclusion is unknown. What is clear is that the petitioner was deprived of Due Process by the action of the Trial Court as affirmed by the Colorado Supreme Court.

IV

UNDER THE CURRENT POSTURE OF THE FIFTH AND FOURTEENTH AMENDMENTS, WAS THE DEFENDANT DEPRIVED OF DUE PROCESS OF LAW WHEN HIS LAW OFFICE EMPLOYEES WERE FORCED TO TESTIFY AGAINST HIM CONTRARY TO AND IN VIOLATION OF STATE STATUTES?

The Court erred in allowing the witnesses Nancy Eggert, Joseph Alexander and Carol Thompson to testify over the stated objections of the petitioner as to privilege on the mistaken premise that the privilege urged by the petitioner was actually that of the client, Davis, and not that of the petitioner. A review of the legislature history of 1963 C.R.S. 154-1-7(3) and similar statutes clearly demonstrates the error of the Trial Court.

The primary rule of statutory construction is that a statute is to be given the plain and ordinary meaning, *People* v *Elliff*, 219 P.224 74 Colo. 81, and the ultimate result to be reached is that of the intention of the legislature, *Robinson* v *State*, 155 Colo. 9, 392 P.2d 606. However, where the language used is plain and its meaning clear and no absurdities result from a straight forward reading of the statute, there is nothing to interpret and the statute must be declared and enforced as written, *People ex. rel. Park Reservoir Co.* v *Hinderlider*, 98 Colo. 505, 57 P.2d 894.

The attorney-client privilege was first codified in this state in 1883 when the legislature passed an act and set forth the public policy of this state very succinctly as follows:

> "There are particular *relations* in which is is the policy of the law to encourage confidence and to preserving it inviolate; therefore, a person shall not be examined as a witness in the following cases . . ." (emph. sup.)

> "§2, the following persons shall not be witnesses:
>
> . . . 2 an attorney shall not, without the consent of his client be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment." †3, Page 290, Acts 1883.

This was codified in the laws of 1908 as §3649, paragraph 2. Note that it is the relationship between the attorney and the client that is sought to be protected and not just the interests of the client or just the interests of the attorney. At that time, there was no language in the statute concerning the use of an attorney's employee as a witness.

In 1911, the legislature enacted an amendment and added a phrase in paragraph 2 by changing the period to a full colon and continuing to subparagraph by adding the following phrase:

> "nor shall an attorney's secretary, stenographer or clerk be examined without the consent of HIS EMPLOYER concerning any fact, the knowledge of which he has acquired in such capacity." (emph. Sup.) Chap. 230, Page 679, Acts 1911.

This phrase has been carried forward throughout every recodification of the laws of the State of Colorado without change to the present date.

To make the point even more clear, the attention of the court is drawn to the Fact that when in 1929 the legislature decided to add Certified Public Accountants to the list of privileged occupations, the bill as originally proposed carried forward verbatim the language just recited concerning the necessity of obtaining the consent of the employer-professional before testimony is to be elicited.

This bill was amended according to the House Journal upon a recommendation upon the Committee of a Whole:

> "by striking the words his employer and substituting in lieu thereof the client concerned." — House Journal 1929, Page 351.

and this amendment was accepted, the entire bill passed and this Statute has been carried forward in the codification of privileged witnesses section in the laws of Colorado since that time.

At this juncture, then there were two diametrically opposed public policies in this state concerning the testimony of the employee of the professional whose testimony was privileged; i.e. for an attorney the consent required was that of the employer-attorney but for a C.P.A., it was the consent of the client and not the consent of the professional which controlled. This peculiar state of facts might lead one to suspect that a Trial Court in its discretion might find either public policy to be controlling, were it not for the fact that in 1961 the legislature added Certified Psychologists to the list of professionally privileged witnesses and adopted the language of the attorney's privilege section in its entirety without any changes, thus bringing Certified Psychologists under the ambit of the public policy concerning attorneys. See Laws of 1961 page 603, § 16. These three acts of the law have been carried forward into C.R.S. 1963, Chapter 154 without changes that affect the arguments set forth above. Thus it is abundantly clear that the intention of the Legislature was to give the *professional* in certain occupations the privelege of the non-testimony of his employees which with certain other occupations the privilege against testimony would be that of the client.

In each case in the instant proceedings, a proper objection was made as to witness nancy Eggert at f. 1721, witness Joseph Alexander at f. 1599 and witness Carol

Thompson at f. 1678. Since the testimony elicited from each witness was designed to show that in some fashion the defendant treated the witness and alleged co-conspirator, Davis, in some nature different from other clients the prejudicial nature of the testimony can hardly be gainsaid. Thus the Trial Court committed prejudicial error of great magnitude which could hardly be classified harmless and for this reason if for no other, all counts upon which the petitioner was convicted should be reversed.

The opinion of the Colorado Supreme Court glosses over this history and while agreeing that a literal reading of the statute would result in total agreement with petitioner's position, goes on to say that the legislature could not possibly have meant what it said. such a misinterpretation denied the petitioner due process under the Fifth and Fourteenth Amendments.

V

UNDER THE CURRENT POSTURE OF THE FIFTH AND FOURTEENTH AMENDMENTS, MAY A CONVICTION BE PERMITTED TO STAND WHEN CERTAIN COUNTS OF THE INDICTMENT FAILED TO CONTAIN OR ALLEGE THE SPECIFIC INTENT SET FORTH IN THE STATE STATUTES AS AN ESSENTIAL ELEMENT OF THE CRIMES CHARGED WHEN REQUIRED BY STATE STATUTE, THEREBY DEPRIVING THE DEFENDANT OF DUE PROCESS OF LAW?

Count 6 purported to charge the defendant with the crime of Theft (receiving) in violation of 1963 C.R.S. 40-5-2 as amended. The first and third paragraphs of that statute read as follows:

"(1)(a) Any person commits theft when he knowingly:

(b) (i) obtains or exerts unauthorized control over anything of value of another; or

(ii) obtains by deception control over anything of value of another; or

(iii) obtains by threat control over anything of value of another; or

(iv) obtains control over any stolen thing of value knowing the thing of value to have been stolen by another; and

(c)(i) Intends to deprive another permanently of the use or benefit of the thing of value; or

(ii) knowingly uses, conceals, or abandons the thing of value in such manner as to deprive another permanently of such use or benefit; or

(iii) uses, conceals or abandons the thing of value intending that such use, concealment or abandonment will deprive another permanently of such use or benefit."

"(3) In every indictment or information charging a violation of this section, it shall be sufficient to allege that on or about a day certain, the defendant committed the

crime of theft by unlawfully taking a thing or things of value of a person or persons named in the indictment of information."

Notwithstanding the language contained in paragraph 3, the Grand Jury elected not to proceed with the simple charge allowed in that paragrah. The Grand Jury instead attempted to charge the crime in accordance with specific sections of paragraph 1.

The construction of C.R.S. 1963, 40-5-2, as amended, leaves considerable to be desired grammatically, but a comparison of that with C.R.S. 1963, 40-4-401, (the new theft statute enacted in 1971), clearly indicates the intention of the legislature. Be that as it may, and without attempting to indulge in a long discourse of the use of a semi-colon in a series, in place of a comma, where the items in the series itself contain commas, it is clear that in order to lay a proper charge under 40-5-2, without the use of paragraph 3, it is necessary to charge one of the allegations of subparagraph 1a *and* 1b, one of the allegations of subparagraph 1c. In charging the crime of theft under the specific subparagraph of § 1, intent to deprive another permanently of the use of benefit of his property is an essential element of the crime of theft and it must be alleged.

42 C.J.S. Indictments and Information, Section 134, beginning at Page 1025 states "Specific intent which is made part of the offense by the statute creating it must be charged . . ." See also *State* v *Giddings*, a Kansas case reported in the March 14, 1975 Pacific Advance Sheets at 531 P.2nd 445. See also case of *State* v *Bills*, 118 Arkansas 44, 176 SW 114, which is a case involving theft receiving. In this case, the state charged that the person had received the stolen goods but neglected to charge that the receiver had intent ot deprive the true owner thereof and the Court ruled that the word "feloniously" did not charge the specific

intent. The importance of charging both a Subsection (1)(b) and Subsection (1)(c), act and intent is well set forth in the case of *People* v *Archuleta*, 180 Colo. 156, 503 P.2nd 346 at Page 159, although the difficulty in that case was in instruction and not in the charge itself. See also *State* v *Schneider*, _____ Wisconsin _____, 211 NW 630 in which the Wisconsin Supreme Court held at Page 632 the word "feloniously" does not allege intent or scienter citing *State* v *Bills* cited above. See also *United States* v *Pettibone*, 148 U.S. 197, 37 L.Ed. 479, 13 S. Ct. 542.

To the same effect as *People* v *School*, 339 Ill. Appeal 7, 88 NE 2nd 681, in which the Illinois Appelate Court held at the bottom of Page 683 that the word "unlawfully" could not be the equivalent of "knowingly" and therefore the information failed to state an offense. Another Illinois case in point is *People* v *Edge*, 406 Ill. 490, 94 NE 2nd 359, wherein the Court said at Page 361:

> "Moreover, where the statutory definition of a crime includes the intent with which the act is committed as an element of the offense, the intent must be alleged." *People* v *Harris*, 3944 Ill. 325, 68 NE 2nd 728, and *People* v *Barnes*, 314, Ill. 140, 145 NE 391.

See also State v *Algor*, et. al., 26 N.J. Super 527, 98A 2nd 340; *State* v *Quatro*, 31 N.J. Super 51, 105 A 2nd 913; *People* v *Lewis, 319 Ill. 154, 149 NE 817; State* v *Sprague*, _____ W. Va. _____, 161 SE 24; *Ornelas* v *U.S.*, 236 F2d 392; and, *People* v *Polsinelli*, 217 N.Y.S. 2d 362.

Also on this point see *Maryland* v *Andresen*, 24 Md. App. 128, 331 A 2d 78, cert. granted on other points. *Andreson* v *State of Maryland*, 96 S. Ct. 2737, _____, U.S. _____, L.Ed. _____.

The failure of an adequate indictment deprived

the Court system of Colorado of jurisdiction over this defendant. Proceeding against a defendant without jurisdiction is an obvious violation of due process contrary to the Fifth and Fourteenth Amendments.

The same argument applies to Count I (Conspiracy) since by case law in Colorado, a charge of conspiracy must contain all of the elements of the substantive crime. *Lipschitz* v *People*, 25 Colo. 261, 63 Pac. 1111.

CONCLUSION

Petitioner herein submits five issues for this Court's consideration: (1) That due process was denied by the erroneous submission to the jury of four counts which were later reversed; (2) that due process was denied by failing to instruct on the defendant's theory of the case; (3) Petitioner was denied due process, equal protection and his right to an impartial jury by the trial court's actions; (4) he was denied due process by the use of evidence which was privileged; and (5) due process was denied by failure of certain counts to allege a required specific intent.

Wherefore pursuant to the foregoing, Petitioner prays this Honorable Court to *issue* its Writ of Certiorari to the Supreme Court of the State of Colorado and that his convictions be reversed.

Respectfully submitted,

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APPENDIX A

NO. 26013

The People of The State
of Colorado,
Plaintiff-Appellee,
v.
R. GEORGE SILVOLA,
Defendant-Appellant.

Appeal from the District Court of the County of Prowers
Hon. John Statler, Judge

EN BLANC JUDGMENT AFFIRMED IN PART, REVERSED IN PART AND CAUSE REMANDED DIRECTIONS

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MR. JUSTICE HODGES delivered the Opinion of the Court.

R. George Silvola was found guilty by a jury of one count of conspiracy to commit theft, five counts of theft-receiving and one count of theft. The trial court ordered that the sentences imposed on the theft counts be served concurrently.

On this appeal, the defendant advances over ten contentions of error. None have merit as to the convictions on count one (conspiracy), count six (theft-receiving), and count seven (theft), and we therefore affirm the trial court's judgments on these counts. We reverse the convictions on counts two, three, four and five because of insufficiency of evidence to sustain them, and remand to the trial court for entry of a dismissal as to these counts.

By indictment, defendent Silvola was charged with participation for a period of over one year prior to February 5, 1970 in a theft ring involving aircraft and aircraft radios. At trial, the prosecution implicated defendant Silvola mainly through the testimony of Richard W. Davis and other accomplices who related the following facts. Silvola, an attorney, (now suspended), was hired in November 1968 to represent Richard w. Davis, who was being held in the Arapahoe County Jail on an extradition warrant from California where he had been charged with aircraft theft. After Davis explained to defendent Silvola how he organized his accomplices to perpetrate aircraft thefts, Silvola persuaded him to remain in Colorado and to continue his theft operation after he got out of jail. After Davis was released in June 1969, he and Silvola began planning to obtain more stolen planes and parts in order to sell them through ads in various trade journals. In addition to helping Davis secure a headquarters for his operation in Colorado Springs, Silvola agreed to act as banker for the operation because Davis needed a stable cash flow to run his organization. Using various aliases, Davis would sell the stolen aircraft equipment, and by prior arrangement, bring

the checks to Silvola. Silvola would then cash the checks on the credit of his trust account or deposit them at a Colorado Springs bank. Davis was thereby afforded a safe conduit for this money and a ready supply of cash.

I.

Sufficiency of the Evidence

Count one of the indictment charged Silvola with conspiring with Davis and others to commit theft and theft-receiving of aircraft and aircraft radios.[1] Silvola maintains that the only direct evidence of an agreement presented by the prosecution was Davis' testimony to the effect that Silvola offered to run the stolen aircraft equipment checks through his trust account to evade federal taxes. He argues that such evidence was insufficient to establish an agreement to commit a Colorado crime and, in any event, was insufficient because Davis, an admitted perjurer and criminal, was totally unreliable as a matter of law.

We disagree that the alleged unreliability of the Davis testimony involves a matter of law. Rather, it involves a determination by the jury of the weight to be given this testimony. Moreover, the specific testimony of Davis which defendant uses to support his other contention actually shows that federal tax evasion was not the only criminal purpose agreed upon. Davis testified that:

> "We had problems—by 'we' my organization was having *problems on getting rid of excess number of checks,* and I had discussed this with George, on how I could *process these checks and* keep the heat off me from the IRS . . . It was suggested by George Silvola at that

[1] C.R.S. 1963, 40-7-35. Now section 18-2-201, C.R.S. 1973.

> time perhaps I use his trust account and other bank accounts that he had to run the stolen equipment checks through . . . (Emphasis added.)

This testimony and especially other testimony by Davis showed that a major purpose for cashing the stolen equipment checks through Silvola's trust account was to provide ready cash for the expenses of the theft operations. Providing a means for laundering the money to evade taxes appears to have been only a secondary purpose.

Circumstantial evidence of an agreement also supported the conspiracy charge. For example, though Davis was not billed for any legal services, he and Silvola were in constant contact during the period Davis was re-organizing his men to steal planes and aircraft radios. Many checks were processed through Silvola's trust account. Silvola helped Davis rent a house from which Davis advertised and sold the stolen aircraft radios, and he was present a various meetings at which thefts were being planned and discussed by Davis and his gang of thieves.

Such evidence, when viewed in a light most favorable to the prosecution, amply supports a finding of an agreement, and thus a conspiracy, between Silvola and Davis to commit theft and theft-receiving. The criminal record and admitted prior perjury of Davis do not go to the admissibility of Davis' testimony but rather to the weight to begiven it, which was properly left for the jury's determination.

On the other hand, with respect to theft-receiving, counts two, three, four and five, the prosecution failed to establish that the subject aircraft radios were stolen, an essential element of the crime of receiving stolen property.[2]

[2]1967 Perm. Supp., C.R.S. 1963, 40-5-2. This statute defining the crime of theft-receiving has since been amended. *See* section 18-4-41-, C.R.S. 1973 (1975

The only indication of theft was the bare conclusion of Davis that the property was stolen. The evidence failed to establish the basis for this conclusion. Nor did it disclose any of the underlying circumstances such as how, when, where or from whom these aircraft radios were stolen. Such a completely conclusory statement by a witness is insufficient when standing alone to prove theft or theft-receiving.

With respect to count six (theft-receiving), however, the owner of a stolen radio testified and gave a description and serial number of his aircraft radio, and where and when it was stolen. Another prosecution witness testified to buying an aircraft radio bearing that same serial number from Davis by means of a check which was processed through Silvola's trust account. Davis then confirmed that this radio was stolen and later purchased from him. Such evidence is sufficient to support the jury's verdict of guilty of count six (theft-receiving). From the evidence, it may be clearly inferred that defendant Silvola aided and abetted Davis in obtaining "control over any stolen thing of value" knowing it to be stolen.[3]

With regard to count seven (theft of an aircraft), the People presented the owner of the airplane who testified to its theft. The prosecution also offered evidence showing how Davis and his accomplices stole the airplane and how it was used as collateral for a bond to get Davis out of jail. When the plane was wrecked by the bonding company, the prosecution then proved that Silvola, knowing the plane to have been stolen, helped repurchase the plane which was then brought back to Colorado for repairs.[4] Such evidence was sufficient to sustain the guilty verdict on count seven

[3]See 1967 Perm. Supp., C.R.S. 1963, 40-5-2(1)(b)(iv).

[4]Defendant claims that venue was improper because the stolen plane was taken to be repaired in Jefferson County and was never in El Paso County during the time of his alleged participation. However, he has waived the objection because it was raised for the first time on appeal. *People v. Jones*, 184 Colo. 96, 518 P.2d 819 (1974). *See also* Crim. P. 18(a) (1963).

because it showed that Silvola aided and abetted Davis in obtaining or exerting unauthorized control over another's property.[5]

II.

Sufficiency of the Indictment

Because of the insufficiency of the evidence to support counts two, three, four, and five, we do not address the question whether the indictment on those counts was sufficient to charge an offense. with regard to count six (theft-receiving), however, defendant argues that the indictment was defective because it failed to allege as an element of the offense the specific intent required for conviction. The indictment charged:

> "That on or about the 4th day of December, 1969, in the County of El Paso, Colorado, R. GEORGE SILVOLA committed the crime of theft by unlawfully and feloniously obtaining control over aircraft parts, aircraft radios, and aircraft equipment belonging to BERNARD BAUTHAUER, stolen things of value with a total and combined value of more than One Hundred Dollars, . . . and knowing the same to have been stolen . . . [i]n violation of Colorado Revised Statutes 1963 as amended, 40-5-2, Theft (Receiving) . . . . "

In *People v. Ingersoll*, 181 Colo. 1, 506 P.2d 364 (1973), this court held that not every element of a crime must necessarily be charged, although the jury must be instructed as to the elements of the crime and the prosecution must prove all elements at trial. In particular, we held that specific intent need not be alleged in a theft charge because the defendent and the jury was sufficiently

[5]See 1967 Perm. Supp., C.R.S. 1963, 40-5-2. Now section 18-4-401, C.R.S. 1973 (1975 Supp.)

advised of the nature of the offense without it. *See also Edwards v. People* 176 Colo. 478, 491 P.2d 566 (1971). We therefore hold that count six of the indictment is not fatally defective.

III.

Aiding and Abetting

Defendant also maintains that he could not have possibly aided and abetted Davis' receipt of stolen property because Davis' crime was complete before Silvola's participation. However, the prosecution's theory, which was proved at trail, was that Silvola knew the items were stolen and on this basis agreed to cash the checks as an integral part of the overall scheme to acquire and sell the stolen goods. Under this theory, Silvola could be properly tried and convicted as an aider and abetter to theft-receiving and thus, as a principal. C.R.S. 1963, 40-1-12 provides in pertinent part that

> [h]e who thus aids, abets or assists, advises or encourages, shall be deemed and considered as principal and punished accordingly."

IV.

Challenge of a Juror

Defendant urges reversal on the ground that the trial court improperly denied his challenge to a juror for cause after the juror stated upon voir dire examination that he had formed an opinion as to the defendant's guilt or innocence. Prior to denying this challenge for cause, the trial court carefully questioned the juror and satisfied itself that this juror would be able to determine the case on the evidence submitted and to put aside any pre-existing opinion. The juror was thereafter excused by the defendant's exercise of a peremptory challenge.

We do not reach the foregoing issue of whether the trial court abused its discretion by denying the challenge for cause because the defendant has failed to show that he was prejudiced by this alleged error. Defendant cites *Skeels* v *People*, 145 Colo. 281, 358 P.2d 605 (1961), for the proposition that his rights were prejudiced because he had to use his last peremptory challenge. However, in *Skeels*, the court announced a two-fold test for determining prejudice as follows: (1) Did the defendant exercise all of his peremptory challenges? and, (2) Was the defendant deprived of the right to challenge other prospective jurors because he was forced to exhaust his peremptory challenges to excuse the earlier suspected juror? The defendant has failed to allege or show that the second factor existed in this case. We therefore reject this contention as a basis for reversible error.

V.

Testimony of Defendant's Employees

Silvola also argues that reversible error occurred when the trial court allowed several of his law office employees to testify without his consent. He relies on the literal language of C.R.S. 1963, 154-1-7[6] to support his contention that an attorney has a privilege not to have his employees testify without his consent, even though the attorney's client (Davis) has waived the attorney-client privilege. C.R.S. 1963, 154-1-7(3) states:

[6]Now Section 13-90-107, C.R.S. 1973.

> "An attorney shall not be examined without the consent of his client, as to any communication made by the client to him, or his advice given thereon in the course of professional employment; nor shall an attorney's secretary, stenographer or clerk be examined without the consent of his employer concerning any fact, the knowledge of which he has acquired in such capacity."

We read the last clause concerning employees as referring to cases where the lawyer himself is unable to testify because of the attorney-client privilege. Consequently, the statute can only be reasonably interpreted as extending the privilege to an attorney's employees if the attorney is also so privileged. Once the attorney can no longer claim the privilege, he likewise can no longer prevent his employees from testifying. To interprete this statute otherwise would lead to anamolous results. Defendant can suggest no public policy, other than the advancement of his self-interest, that supports his interpretation.

Alternatively, where a statute would operate unjustly, or absurd consequences would result from a literal interpretation of terms and words used that would be contrary to its obvious andmanifest purposes, the intention of the framers will prevail over such a literal interpretation. *People* v *Driver*, _____ Colo. _____, 539 P.2d 1248 (1975). The legislative intent behind this provision was to protect the client and not the attorney. *Mauro* v *Tracy*, 152 Colo. 106, 380 P.2d 570 (1963); *Fearnley* v *Fearnley*, 44 Colo. 417, 98 P. 819 (1908); and *Denver Tramway Co.* v *Owens*, 20 Colo. 107, 36 P. 848 (1894). Silvola cannot therefore invoke this statute to protect himself after his client waived the attorney-client privilege as he did in this case.

The defendant's other contentions are wholly without merit and require no discussion.

* * * * *

Judgment affirmed as to counts one, six and seven. As to counts two, three, four and five, the judgment is reversed, and this cause is remanded with directions to dismiss these charges.

MR. JUSTICE DAY does not participate.

MR. JUSTICE GROVES concurring in part, dissenting in part, and concurring in the result in part.

PEOPLE v SILVOLA NO. 26013

MR. JUSTICE GROVES concurring in part, dissenting in part and concurring in the result in part.

I dissent as to the affirmance of the conviction under count six for the reason that I do not think the evidence sufficiently links the defendant with the article stolen.

I concur in the result in the affirmance of the conviction under count seven.

I concur in the remainder of the majority opinion.

APPENDIX B:

2 photographs of 4 x 4 boards with Exhibits attached.

(Release of photo s for reproduction purposes refused by Trial Court.)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-218

R. GEORGE SILVOLA,
Petitioner,
vs.
THE PEOPLE OF THE STATE OF COLORADO
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

CITATION TO OPINION BELOW

The opinion of the Colorado Supreme Court has not yet been reported in the official Colorado Reports, but has been reported in the advance sheets as *People v. Silvola*, 547 P.2d 1283 (Colo. 1976).

STATEMENT OF THE CASE

Petitioner R. George Silvola, an attorney, was hired in 1969 to help Richard Davis get out of jail, where he was being held for aircraft theft. Although he was in jail when

he first met Silvola, Davis planned to escape and take his stolen airplane radios out of the country (ff. 2580, 2585); because the market price for the goods was higher here in the United States, Silvola talked Davis out of the escape and urged him to "keep working" (ff. 2596, 2597). Davis put up one of his stolen airplanes as collateral on his bond, was released from jail, and immediately got in touch with petitioner: the two were in constant contact for the next several months until Davis' arrest in December, 1969 (ff. 2629, 2630, 2658, 3083), as Davis organized his men and sent them out to steal airplanes and airplane parts; the stolen items would then be advertised and sold nationally, under a variety of aliases. Davis' men were told to contact Silvola if they ever had any trouble with the law (ff. 2491, 3009), and occasionally they would report directly to petitioner on the progress or success of a theft (ff. 1232, 1240, 2892). Silvola and Davis took a trip to Canada and discussed a stolen plane being repainted in Arizona (f. 2634). Silvola helped Davis get a house in which to store the stolen parts brought to him (ff. 2640, 2641, 2663), suggested he use the alias "Martin" (ff. 2643), and together they looked over some stolen radios stored in a trailer (f. 3008). Once, when they suspected someone might be checking on the operation, petitoner suggested they move three stolen planes from the Pikes Peak Airport to avoid detection (f. 2840). At one point, Silvola requested and received from Davis a stolen airplane: Davis explained to petitioner that it had been stolen, and turned it over to him as payment on a debt (f. 2918). They had one major problem hindering their machinations: large amounts of ready cash and fast credit were needed to run the operation (ff. 2667, 3616), but because of the large sums, various banks, and numerous names listed as payee, Davis' bank had to process the checks, thus tying up needed funds for long periods of time. To eliminate this delay and to facilitate the smooth running of the operation, Silvola suggested (ff. 2636, 2669) Davis take all the checks he received from

the sale of the radios stolen by the operation and turn them over to petitioner (ff. 1257, 2792); Silvola collected all of these checks from the sale of the equipment he knew to be stolen (ff. 3567, 3570), ran them through his trust account to launder them for Davis, and gave Davis cash or local checks in return (ff. 2679, 2682, 2804, 2936, 3041, 3042, 3080, 3081, 3146, 3366, 3616). In fact, Davis had no other way to cash the checks and Silvola took care of all the checks that Davis could not otherwise dispose of (ff. 2669, 2670, 2690, 2695, 2696, 2699, 2708, 2712, 2721, 2732, 2733, 2735, 2736, 2738, 2739, 2746, 2748, 2762, 2765, 2768, 2769, 2770, 2780, 2784, 2787 ,2790, 2951). Silvola thus continually provided Davis with the cash and credit the theft operation needed to be run successfully.

Davis was eventually caught again, and implicated Silvola in the scheme. Petitioner was charged with one count of Conspiracy to Commit Theft from November 1968 to February 1970, five counts of Theft-Receiving of airplane parts, radios, and radio equipment in the Fall of 1969, and two counts of Theft of entire aircraft between September and November 1969 (ff 7-15); the last count of stealing an entire airplane was subsequently dismissed on the People's motion (ff. 457-459, 465). Trial commenced on January 8, 1973. Juror James Lyle Brown indicated during voir dire that he might have an opinion as to petitioner's guilt or innocence, and was accordingly challenged for cause (ff. 850-855, 864); the court denied these challenges after it had extensively questioned the juror and satisfied itself that he could render a fair and impartial verdict (ff. 851, 852, 857, 858, 860, 861). Petitioner subsequently removed Mr. Brown from the panel by use of his last peremptory challenge (f. 866). During trial Davis testified against his former attorney. Over petitioner's objection that the testimony violated the attorney-client relationship, three of Silvola's former employees testified briefly on his handling of the Davis

accounts. The jury found Silvola guilty of all seven charges, and petitioner appealed to the Colorado Supreme Court. That court reversed four of the convictions for theft-receiving, as it held the evidence insufficient to establish that the subject aircraft radios were stolen, *People* v. *Silvola*, *supra*, 547 P.2d at 1286 (Colo. 1976); petitioner's convictions for conspiracy, one count of theft-receiving, and one count of theft were affirmed. Petitioner has subsequently sought a Writ of Certiorari from this Court.

SUMMARY OF THE ARGUMENT

Petitioner's complaints were not framed in federal constitutional terms below, and present no federal issues of substance here, and thus his Petition should be denied.

ARGUMENT

I.

THE PEOPLE OF THE STATE OF COLORADO MOVE FOR DISMISSAL OF THIS PETITION FOR LACK OF JURISDICTION UNDER 28 U.S.C. § 1257 BECAUSE ALLEGED FEDERAL CONSTITUTIONAL ERRORS WERE NEVER RAISED OR DECIDED AS SUCH IN THE COLORADO APPELLATE COURTS.

The petition should be dismissed for lack of jurisdiction under 28 U.S.C. § 1257(3) (1970), since petitioner did not raise any federal constitutional questions in his briefs to the Colorado Supreme Court, and that court accordingly decided no federal constitutional questions of substance. *Hill v. California*, 401 U.S. 797, 805 (1971); *Cardinale v. Louisiana*, 394 U.S. 437 (1969); 28 U.S.C. § 1257(3); Sup. Ct. R. 19. *See* also: Sup. Ct. R. 23(1)(f). Petitioner's assertions below, though similar to the questions presented here, were then claimed as errors of state law and not framed as errors of federal constitutional dimensions. See: state brief of appellant.

In *Picard v. Conner*, 404 U.S. 270 (1971), until seeking federal habeas corpus review the petitioner had argued he was improperly indicted under Massachusetts law. *Id.*, at 273. The First Circuit Court of Appeals, in reversing the federal district court's denial of the habeas corpus claim, found an equal protection argument inherent in petitioner's claim. Id., at 277. However, this Court reversed, holding that, "[T]he federal claim must be fairly presented to the state courts. . . . The claim that an indictment is invalid is not the substantial equivalent of a claim that it results in an unconstitutional discrimination." *Id.*, at 275, 278. As in *Picard*, *supra*, all of petitioner's claims have previously been framed only in terms of violation of state law, and accordingly are not properly before this Court on Petition for Certiorari. Although *Picard* was a habeas corpus case brought under 28 U.S.C. § 2254 (1970), the interests of federalism—that federal constitutional questions in state criminal cases must first be decided in such a framework by the state courts—are similar in cases of direct review by way of Certiorari under 28 U.S.C. § 1257(3) (1970). *Hill v. California*, 401 U.S. at 805; *Cardinale v. Louisiana*, 394 U.S. at 439. This Court should therefore dismiss this petition for lack of jurisdiction for petitioner's failure properly to present the alleged federal constitutional questions first to the Colorado courts.

II.

NO FEDERAL CONSTITUTIONAL QUESTIONS OF SUBSTANCE ARE RAISED BY PETITIONER'S ARGUMENT THAT THE SUBMISSION TO THE JURY OF SEVEN COUNTS, CONVICTIONS ON FOUR OF WHICH WERE ULTIMATELY REVERSED, SOMEHOW TAINTED THE JURY'S DELIBERATION ON THE REMAINING THREE COUNTS AND THAT THE JURY SPENT INSUFFICIENT TIME IN ITS DELIBERATIONS.

Petitioner was convicted initially of seven counts of theft-receiving, theft, and conspiracy; the Colorado Supreme Court reversed four of these theft-receiving convictions for insufficint evidence. Petitioner claims that the submission of all seven counts to the jury initially somehow "tainted" the jury's deliberation because four convictions were ultimately reversed. Petitioner also intimates that less than three hours is insufficient time for a jury fairly to reach a verdict.

Petitioner's failure to cite authority on this issue is evidence of the novelty of his claim, making it uniquely unsuitable for consideration by this Court. Sup. Ct. R. 19. *See*: *State v. Killary*, 113 Vt. 604, 349 A.2d 216 (1975), where the Vermont Supreme Court could find no instance in which the shortness of a jury's deliberation in a criminal case was reversible error. *See* also: *United States v. Brotherton*, 427 F.2d 1286, 1289 (8th Cir. 1970), wherein five to seven minutes was held to be ample time to resolve whether or not the circumstances of the case warranted a finding that defendant knew the motor vehicle was stolen. *See also*: *United States v. Isaacs*, 364 F. Supp. 895 (N.D. Ill. 1973), affirmed 493 F.2d 1124 (7th Cir. 1974), cert. denied sub nom., *Kerner v. United States*, 417 U.S. 976 (1974).

III.

PETITIONER'S CLAIM THAT THE STATE TRIAL COURT FAILED TO INSTRUCT ON HIS ALLEGED THEORY OF THE CASE RAISES NO FEDERAL CONSTITUTIONAL QUESTIONS OF SUBSTANCE, AND IS UNSUPPORTED BY COMMON LAW AS THE PROPOSED INSTRUCTION WAS IRRELEVANT AND WITHOUT A LEGAL BASIS.

Petitioner somewhat incredibly claims that the Colorado trial court committed error of constitutional magnitude by refusing to instruct that a check made out to a fictitious payee may in some cases be "a valid instrument and subject to transfer" under Article 3 of the Uniform Commercial Code.

Defendant again raises no federal constitutional claim. Both the Colorado and the federal courts recognize a criminal defendant is entitled to instructions relating to a theory of defense, if that theory is supported by law and has some foundation in the evidence. *United State v. Garner*, 529 F.2d 962 (6th Cir. 1976); *United States v. Swinton*, 521 F.2d 1255 (10th Cir. 1975). *See*: Fed. R. Crim. P. 30; Colo. R. Crim. P. 30. However "elementary" this rule may be, *see*, *Perez v. United States*, 297 F.2d 12 (5th Cir. 1961), it is nevertheless based on common law and state and federal rules of criminal procedure. *See*: *United States v. Nance*, 502 F.2d 615 (8th Cir. 1974), cert. denied 420 U.S. 926 (1975). These rules "[A]re not constitutional imperatives. . . . They are procedural only." *United States ex rel. Gaughler v. Brierley*, 477 F.2d 516, 523 (3rd Cir. 1973). Accordingly, violation of such a rule presents no federal constitutional question.

There is no reason for this Court to entertain this issue. There is no federal constitutonal issue, or even dis-

agreement over the applicable state law, but rather only a dispute over a state judge's application of state law to the facts of petitioner's case in a state court. Furthermore, petitioner's state law claim is frivolous. Whether or not a check is negotiable or transferable is irrevelant to the question of whether an accused "[O]btains control over any stolen thing of value knowing the thing of value to have been stolen by another . . . " Colo. Rev. Stat. Ann. 40-5-2(1) (b) (iv) (Perm. Supp. 1967). *See*: Colo. Rev. Stat. Ann. 155-3-405(2) (1963). Accordingly the tendered instruction did not constitute a defense, was not an exculpatory "theory of the case," and was properly denied.

IV.

PETITIONER'S CLAIM THAT THE COLORADO SUPREME COURT MISAPPLIED COLORADO CASE LAW IN DETERMINING WHETHER PREJUDICIAL ERROR OCCURRED IN THE DENIAL OF A CHALLENGE OF A POTENTIAL JUROR FOR CAUSE RAISES NO FEDERAL CONSTITUTIONAL QUESTION.

Petitioner disputes the holding of the Colorado Supreme Court that, under the rule of *Skeels v. People*, 145 Colo. 281, 358 P.2d 605 (1961), a defendant must allege or show that he was actually deprived of the opportunity to challenge peremptorily other undesirable members of the venire; he asserts that the mere exhaustion of his peremptory challenge is in and of itself a sufficient showing of prejudice. Whatever the merits of the petitioner's argument under the law of Colorado, it has no federal constitutional significance, as is apparent from petitioner's inability to cite any constitutional authority for his clam. Defendant has also failed to express to this Court any reasons why this Court should interfere with the Colorado court's determination of this issue of state procedure.

V.

PETITIONER'S CLAIM THAT THE COLORADO COURTS DENIED HIS DUE PROCESS RIGHTS BY ALLEGEDLY MISINTERPRETING THE COLORADO STATUTE ON THE ATTORNEY-CLIENT PRIVILEGE RAISES NO FEDERAL QUESTION.

The question of attorney-client privilege is peculiarly nonconstitutional and therefore presents no federal questions to this Court: *See e.g. In Re Grand Jury Proceedings*, 517 F.2d 666 (5th Cir. 1975); Fed. R. Evid. 501 and accompanying Historical Note.

VI.

PETITIONER'S CLAIM, THAT THE FAILURE OF THE PROSECUTION TO ALLEGE ALL ELEMENTS OF THE OFFENSE CHARGED IN THE INDICTMENT DENIED HIM DUE PROCESS, RAISES NO FEDERAL CONSTITUTIONAL ISSUES OF SUBSTANCE.

The question of whether a state criminal indictment must allege all elements of a crime, including the element of intent, is a matter of state law but not federal constitutional law. Cf.: *Illinois v. Somerville*, 410 U.S. 458, 459 (1973) (in determining "manifest necessity" requirement of Double Jeopardy Clause the Court looked to state law on the significance of the indictment)and the dissent of Justice Marshall, *id.*, at 479-480; *Russell v. United States*, 369 U.S. 749, 761-762 (1962). Significantly, petitioner can marshal no federal cases to support his claim. While he cites cases from many state courts, he conveniently ignores the governing Colorado case of *People v. Ingersoll*, 181 Colo. 1, 3, 506 P.2d 364, 365 (1973), which held that every element of a crime need not be charged in an information,

although the jury of course must subsequently be instructed as to the elements of the crime and the prosecutor must prove all the elements at trial. The holding of *People v. Ingersoll* was reaffirmed by the Colorado Supreme Court in this case.

CONCLUSION

Since he failed to present his alleged federal constitutional claims to the Colorado courts in the first instance, petitioner cannot invoke the jurisdiction of this Court under 28 U.S.C. § 1257(3). None of the claims involved federal questions of substance as required by 28 U.S.C. § 1257(3) and Sup. Ct. R. 19, nor has petitioner stated any special or important reasons why this Court should review this case. The People of the State of Colorado therefore pray that the Petition for Writ of Certiorari be DENIED.

Respectfully submitted,

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